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HOW TO BE CRITICAL

STEPHEN M. FELDMAN*

INTRODUCTION

What is critical legal theory, as opposed to traditional legal theory? Traditional legal theory is simultaneously descriptive and prescriptive. Traditional theorists seek to describe how a large number of judicial decisions can be either reduced to a small set of axiomatic principles, synthesized into a coherent framework, or both. Traditional legal theory, first and foremost, tries to make sense of the past. John Hart Ely's constitutional theory of representation reinforcement,¹ for instance, explains how a significant number of Warren Court decisions, most prominently *Brown v. Board of Education*,² are supposedly consistent with and animated by a commitment to an overarching principle: representative democracy. The Supreme Court's role, according to this theory, is to police the democratic process.³ If the democratic process is fair and open, then the Court should defer to legislative judgments, regardless of the substantive content of those judgments.⁴ If, however, the democratic process is somehow defective, then the Court should deem the legislative action unconstitutional.⁵ The Warren Court's 1966 decision in *Harper v. Virginia Board of Elections*⁶ held that poll taxes in state elections were unconstitutional because, according to Ely, such taxes prevented some citizens from participating fully in the democratic process.⁷ The state was unable to articulate a sufficiently

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1. See generally JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

2. 347 U.S. 483 (1954).

3. See ELY, *supra* note 1, at 73.

4. See *id.* at 75-80.

5. See *id.*

6. 383 U.S. 663 (1966).

7. See ELY, *supra* note 1, at 120.

compelling reason for undermining the representative democratic processes.⁸

Once Ely describes this principle of representative democracy as animating the key Warren Court decisions, he can use it for prescriptive purposes, either to recommend how the Court should decide future cases or to criticize how the Court has decided previous cases. Most famously, Ely criticized the early Burger Court decision of *Roe v. Wade*⁹ as indefensible under representation-reinforcement theory.¹⁰ If the justices had focused on the fairness of the democratic process, Ely argued, then the Court would have upheld the anti-abortion statutes, regardless of the justices' personal sentiments about abortion.¹¹ But the Court, according to Ely, had not restrained itself to policing the democratic process but instead had intruded into the sphere of legislative decision making. The Court, in other words, had contravened the overarching principle of representative democracy and thus had acted in an unjustifiable manner.¹²

Critical legal theory has a different focus and purpose than traditional legal theory. To be sure, as defined, traditional theory is in part critical. Traditional legal theorists routinely invoke their theories to criticize particular judicial decisions or to recommend future judicial and legislative courses. Yet, whereas traditional theory generally accepts the assumptions and premises that undergird the bulk of judicial decisions in a field, critical theory often aims to doubt and disrupt those very assumptions and premises. The descriptive component of traditional theory, in particular, accepts the status quo to a large degree, while critical theory either attacks or at least questions the status quo. While traditional theory aims to make sense of the cases, critical theory often aims to show how the cases are unprincipled and even nonsensical. Most broadly, critical legal theory is intellectual activity oriented toward criticizing the dominant modes of understanding law, practicing law, or deciding cases.

To some degree, the term "critical theory" is oxymoronic. Traditional theory, as discussed, not only largely accepts the status

8. See *id.* For a discussion of how representation-reinforcement theory fits within the legal process school of thought that emerged after World War II, see STEPHEN M. FELDMAN, *AMERICAN LEGAL THOUGHT FROM PREMODERNISM TO POSTMODERNISM: AN INTELLECTUAL VOYAGE* 134-36, 147, 150 (2000).

9. 410 U.S. 113 (1973).

10. See generally John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973).

11. See *id.*

12. See *id.* at 926.

quo but also aims to prescriptively guide practice, legal or otherwise. To some theorists, such prescriptive guidance is the *sine qua non* of theory.¹³ Critical theorists, though, typically aim to disrupt ordinary practices. Such intellectual work might be better referred to as critical *activity*, rather than critical *theory*, because it is oriented more toward questioning and displacing than guiding our legal practices. To be sure, critical theorists often aim to disrupt ordinary practices so that they might be replaced with more just practices. Even in such circumstances, however, critical theorists rarely lay out a road map to guide future legal practices, as traditional theorists are apt to do.¹⁴ The basic assumptions of the status quo weigh all of us down as if we were wearing cement boots.¹⁵ Consequently, from the critical thinker's standpoint, to disturb a reader's comfortable acquiescence to the status quo so that she might reconsider some basic assumptions is heavy work. Attempting to go further, trying to imagine some radical alternative to the status quo and to persuade the reader to follow that alternative is likely to be futile and even foolish. To crack the reader's cement boots sufficiently that she might contemplate twisting around, looking in a different direction, is the critical thinker's primary task and ambition. And it is an ambition that often proves difficult to fulfill.¹⁶

While the term "critical activity" might more accurately describe the work of critical thinkers, such thinkers nonetheless occasionally theorize about their own critical activities. From this perspective, then, critical *theory* might be understood most precisely as a meta-activity: a method or approach that could guide one who seeks to engage in critical activity. A critical theory might assert, for instance, that if one seeks to do critical activity, then one should follow steps one, two, and three, or something of the sort. To actually do the critical work, however—to disrupt dominant assumptions and

13. For this reason, Stanley Fish asserts that "antifoundationalist theory," which is somewhat typical of postmodern thought, "really isn't a theory at all; it is an argument against the possibility of theory." Stanley Fish, *Consequences*, 11 CRITICAL INQUIRY 433, 439 (1985).

14. See David Couzens Hoy, *Critical Theory and Critical History*, in DAVID COUZENS HOY & THOMAS MCCARTHY, CRITICAL THEORY 101, 106-07, 202 (1994) (suggesting the possibility of differentiating between critical theory and critical activity).

15. Marx wrote: "The tradition of all the dead generations weighs like a nightmare on the brain of the living." Karl Marx, *The Eighteenth Brumaire of Louis Bonaparte*, in THE MARX-ENGELS READER 594, 595 (Robert C. Tucker ed., 1978).

16. For a discussion of how postmodernists generally refrain from making the normative recommendations that are common in modernist scholarship, see FELDMAN, *supra* note 8, at 174-78.

practices—one would need to implement steps one, two, and three, rather than theorizing about those steps.¹⁷

The central question for this essay is the following: Given the nature of critical activity and theory, how can one be critical? My thesis is that Hans-Georg Gadamer's philosophical hermeneutics,¹⁸ when combined with Jürgen Habermas's communicative (or discourse) theory¹⁹ or Jacques Derrida's deconstruction,²⁰ can guide us toward critical activity. Part I briefly summarizes philosophical hermeneutics. Part II examines the relationship between Gadamer's hermeneutics and critical legal activity. Philosophical hermeneutics explains, on the one hand, how we can come to understand critical concepts and, on the other hand, how being critical can be a difficult

17. There is a long-running debate concerning the effectiveness of theorizing as a practice. See Steven Knapp & Walter Benn Michaels, *Against Theory*, 8 CRITICAL INQUIRY 723 (1982); Steven Knapp & Walter Benn Michaels, *Against Theory 2: Hermeneutics and Deconstruction*, 14 CRITICAL INQUIRY 49 (1987); Steven Mailloux, *Truth or Consequences: On Being Against Theory*, 9 CRITICAL INQUIRY 760 (1983); Richard Rorty, *Philosophy Without Principles*, 11 CRITICAL INQUIRY 459 (1985).

18. See HANS-GEORG GADAMER, *TRUTH AND METHOD* (Joel Weinsheimer & Donald G. Marshall trans., Crossroad 2d rev. ed. 1989) (1960) [hereinafter GADAMER, *TRUTH AND METHOD*]; Hans-Georg Gadamer, *Destruktion and Deconstruction* (Geoff Waite & Richard Palmer trans.), in *DIALOGUE AND DECONSTRUCTION: THE GADAMER-DERRIDA ENCOUNTER* 102 (Diane P. Michelfelder & Richard E. Palmer eds., 1989) [hereinafter Gadamer, *Deconstruction*]; Hans-Georg Gadamer, *On the Scope and Function of Hermeneutical Reflection* (G.B. Hess & R.E. Palmer trans., 1967), in *PHILOSOPHICAL HERMENEUTICS* 18 (David E. Linge ed. & trans., 1976) [hereinafter Gadamer, *On the Scope*]; Hans-Georg Gadamer, *The Universality of the Hermeneutical Problem* (David Linge trans.), in JOSEF BLEICHER, *CONTEMPORARY HERMENEUTICS: HERMENEUTICS AS METHOD, PHILOSOPHY AND CRITIQUE* 128 (1980) [hereinafter Gadamer, *Universality*]. Excellent analyses of Gadamer's philosophical hermeneutics are in GEORGIA WARNEKE, *GADAMER: HERMENEUTICS, TRADITION AND REASON* (1987), and JOEL C. WEINSHEIMER, *GADAMER'S HERMENEUTICS: A READING OF TRUTH AND METHOD* (1985).

19. See JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY* (William Rehg trans., Mass. Inst. Tech. 1996) (1992) [hereinafter HABERMAS, *BETWEEN FACTS AND NORMS*]; JÜRGEN HABERMAS, *LEGITIMATION CRISIS* (Thomas McCarthy trans., Beacon Press 1975) (1973) [hereinafter HABERMAS, *LEGITIMATION CRISIS*]; 1 JÜRGEN HABERMAS, *THE THEORY OF COMMUNICATIVE ACTION: REASON AND THE RATIONALIZATION OF SOCIETY* (Thomas McCarthy trans., Beacon Press 1984) (1981) [hereinafter 1 HABERMAS, *THE THEORY*]; 2 JÜRGEN HABERMAS, *THE THEORY OF COMMUNICATIVE ACTION: LIFEWORLD AND SYSTEM: A CRITIQUE OF FUNCTIONALIST REASON* (Thomas McCarthy trans., Beacon Press 1987) (1981) [hereinafter 2 HABERMAS, *THE THEORY*]; Jürgen Habermas, *The Hermeneutic Claim to Universality*, in BLEICHER, *supra* note 18, at 181 [hereinafter Habermas, *Universality*]; Jürgen Habermas, *A Review of Gadamer's Truth and Method*, in *UNDERSTANDING AND SOCIAL INQUIRY* 335-63 (Fred R. Dallmayr & Thomas A. McCarthy eds., 1977) [hereinafter Habermas, *Review*].

20. See JACQUES DERRIDA, *DECONSTRUCTION IN A NUTSHELL: A CONVERSATION WITH JACQUES DERRIDA* (John D. Caputo ed., 1997) [hereinafter DERRIDA, *NUTSHELL*]; JACQUES DERRIDA, *OF GRAMMATOLOGY* (Gayatri Chakravorty Spivak trans., Johns Hopkins Univ. Press 1976) (1967) [hereinafter DERRIDA, *GRAMMATOLOGY*]; JACQUES DERRIDA, *Structure, Sign and Play in the Discourse of the Human Sciences*, in *WRITING AND DIFFERENCE* 278 (Alan Bass trans., Univ. Chicago Press 1978) (1967) [hereinafter DERRIDA, *Structure*].

task. The subsections of Part II then explore first, how Habermas's discourse theory and second, how Derrida's deconstruction can supplement philosophical hermeneutics to help engender critical activity.

I. GADAMER'S PHILOSOPHICAL HERMENEUTICS

Modernists view textual understanding from within their archetypal subject-object metaphysics: the subject or self stands separate from an objective world. To have knowledge, according to the modernists, the subject must somehow bridge the gap between itself and the objects of the world. The subject needs either to directly access those objects or, at least, to mirror them in consciousness.²¹ If the modernist subject cannot bridge the gap to, and connect with, the objective world, then the subject is left floating untethered through an abyss of relativism, nihilism, and solipsism. Thus, from this modernist vantage, in order to understand or to know the meaning of a text, the subject or self needs to access the objective meaning of the text. To do so, the subject needs to implement a method or technique that overcomes or neutralizes her prejudices and thus reveals the true meaning of the text. For example, according to some modernist jurisprudents, to understand the objective meaning of a constitutional provision, a judge supposedly needs to ascertain the framers' intentions when they wrote that provision.²² If a judge does not invoke a method that divulges the objective meaning in this manner, then the judge inevitably becomes an unconstrained rogue, and constitutional interpretation becomes a political free-for-all where anything goes.²³

Gadamer follows Heidegger by repudiating the subject-object metaphysics of modernism.²⁴ The subject never stands separately and independently from the objective world, and hence, "our perception is never a simple reflection of what is given to the senses."²⁵ Instead, according to Gadamer, the self or subject's very being-in-the-world is

21. See generally RICHARD RORTY, *PHILOSOPHY AND THE MIRROR OF NATURE* (1979).

22. See, e.g., ROBERT BORK, *THE TEMPTING OF AMERICA* 159 (1990) ("The interpretation of the Constitution according to the original understanding, then, is the only method that can preserve the Constitution, the separation of powers, and the liberties of the people.").

23. See J.M. Balkin, *Ideology As Constraint*, 43 STAN. L. REV. 1133, 1141 (1991) (discussing the "rogue judge").

24. See FELDMAN, *supra* note 8, at 30; see also Stephen M. Feldman, *The New Metaphysics: The Interpretive Turn in Jurisprudence*, 76 IOWA L. REV. 661, 681-82 (1991).

25. GADAMER, *TRUTH AND METHOD*, *supra* note 18, at 90.

interpretive.²⁶ Hence, Gadamer proceeds to explain textual understanding in a fashion that differs radically from the modernist view.

Gadamer emphasizes that we all live within the cultural tradition (or traditions) of a community.²⁷ The communal tradition inculcates each individual with prejudices that open us to the possibility of understanding textual meaning. Thus, whereas the modernist insists that prejudices must be overcome or banished so that we can perspicaciously understand a text, Gadamer argues that prejudices are a necessary prerequisite to textual understanding.²⁸ Prejudices, that is, enable or empower us. As soon as we turn to a text, our prejudices imbue us with a fore-understanding—a first understanding of the text that initiates and orients the remainder of the interpretive process. As one penetrates deeper into the text, our fore-understanding can give way to more refined interpretations of the text, and indeed, our prejudices can be transformed during this process. Yet, without our prejudices, derived from communal tradition, interpretation cannot even begin.

Significantly, though, prejudices not only enable but also constrain understanding. We are never free and independent subjects floating untethered through an abyss because our prejudices limit what we can understand and perceive. Our prejudices constitute a horizon: “the range of vision that includes everything that can be seen from a particular vantage point.”²⁹ Quite simply, we cannot see beyond our horizon, though our horizon constantly shifts and moves.

The Gadamerian maxim that our being-in-the-world is interpretive means, then, that all of our understanding, perceptions, and experiences are simultaneously enabled and constrained by our prejudices, which are derived from communal traditions. Even prereflective textual understanding—understanding of a text that seems immediate and plain—arises only because we are already and always situated within our horizons of prejudices and traditions. Yet, Gadamer adds:

This formulation certainly does not mean that we are enclosed within a wall of prejudices and only let through the narrow portals those things that can produce a pass saying, “Nothing new will be said here.” Instead we welcome just that guest who promises something new to our curiosity. But how do we know the guest

26. See FELDMAN, *supra* note 8, at 30.

27. See GADAMER, TRUTH AND METHOD, *supra* note 18, at 202.

28. See *id.* at 302.

29. *Id.*

whom we admit is one who has something *new* to say to us? Is not our expectation and our readiness to hear the new also necessarily determined by the old that has already taken possession of us?³⁰

Gadamer analogizes textual understanding to a conversation or dialogue between the interpreter and the text.³¹ As soon as the interpreter turns to a text, she presumes that it has something meaningful to say—that it contains some “unity of meaning” that is complete and intelligible.³² The interpreter begins with a fore-understanding of the text, but by questioning the text, listening to its answers, asking new questions, and listening to more answers, the interpreter’s understanding of the text shifts. This give and take process, this dialogical interplay of the interpreter’s prejudices and the text, produces a “fusion of horizons”³³ or “consensus over meaning”³⁴ between the interpreter and the text. Understanding, as Gadamer puts it, “is, primarily, agreement.”³⁵ Hence, the interpreter does not discover an objective meaning in the text by applying some method or mechanical process, as modernists assert. Rather, through the conversation of the hermeneutic process, the truth or meaning of the text emerges or “comes into being.”³⁶

II. CRITICAL LEGAL ACTIVITY

How can Gadamer’s philosophical hermeneutics contribute to critical legal activity? For one thing, Gadamer explains how we come to understand a text or a concept. For example, contrary to the critics of postmodernism, hermeneutics does not undermine the rule of law but rather explains how we can understand a rule of law in the first place.³⁷ Likewise, if we wish to discuss the justice or injustice of certain legal arrangements, then Gadamer reveals how the concept of justice becomes meaningful. Justice is not grounded on some firm modernist foundation and does not have an objective meaning, but we nonetheless can understand and discuss the meaning of justice. We open to the meaning of justice from the horizon of our prejudices,

30. Gadamer, *Universality*, *supra* note 18, at 133.

31. See GADAMER, TRUTH AND METHOD, *supra* note 18, at 386-88.

32. *Id.* at 294.

33. *Id.* at 388.

34. WARNKE, *supra* note 18, at 107.

35. GADAMER, TRUTH AND METHOD, *supra* note 18, at 180.

36. *Id.* at 462.

37. See Francis J. Mootz III, *Is the Rule of Law Possible in a Postmodern World?*, 68 WASH. L. REV. 249 (1993).

which are derived from our communal traditions.³⁸ In other words, if not for our *interpretive* being-in-the-world, we could not discuss justice at all.³⁹ From this vantage, philosophical hermeneutics provides sustenance to both traditional theory and to critical activity or theory. Whether one seeks to develop a theory to prescriptively guide legal practice—that is, a traditional theory—or one seeks instead to question the underlying assumptions hidden within our ordinary legal practice—that is, critical activity—Gadamer explains how the understanding necessary for such intellectual work is possible.

Yet, Gadamer also helps explain why engaging in critical activity, in particular, can be such a formidable task. Gadamer encourages us to risk our prejudices and traditions in our interpretive encounters, as we open to the message of the text.⁴⁰ But if understanding is possible only because of our participation in communal traditions, as Gadamer argues,⁴¹ then the questioning or disrupting of the basic assumptions produced by such traditions is likely to be extremely difficult to accomplish. To be sure, traditions are contingent and must be constantly reconstructed, yet they have a powerful inertia. Our traditions limit our possibilities. Speech or writing that is aligned or consistent with the dominant communal traditions and personal prejudices of a reader or listener is most likely to seem persuasive or forceful. Such speech or writing, in other words, will tend to be effective or persuasive exactly because it fits with our assumptions or preconceived notions. At the same time, any critical activity—that is, writing or speech that cuts against the grain—is likely to seem confused, offensive, or downright ridiculous exactly because it is in tension with the dominant traditions and prejudices. Such speech or writing rarely will be able to overcome our preconceived notions that suggest its message is wrong-headed. Nevertheless, critical activity must occur from within our communal traditions. There is no other position—no external and objective standpoint—from which to operate, critically or otherwise.

Partly because critical activity can be so difficult, a certain method (or methods) might be especially useful for a critical thinker.

38. See Stephen M. Feldman, *The Politics of Postmodern Jurisprudence*, 95 MICH. L. REV. 166, 197 (1996).

39. See *id.* at 197-98.

40. See Stephen M. Feldman, *Made for Each Other: The Interdependence of Deconstruction and Philosophical Hermeneutics*, 26 PHIL. & SOC. CRITICISM 51, 53, 58-59 (2000).

41. See Feldman, *supra* note 38, at 197.

An efficacious method might help a critical thinker at least spark critique, getting it moving, despite the obstacles that must be overcome. What Gadamer does not do, however, is provide a method for engaging in either traditional or critical theory (or activity). In fact, Gadamer studiously avoids articulating any method or technique for understanding a text. That purposeful shunning of method is the ironic point of the title of his *magnum opus*, *Truth and Method*: Method cannot possibly reveal an objective truth or meaning for a text. Instead, as discussed, the truth of a text emerges through the hermeneutic process itself.

Significantly, though, Gadamer's deprecation of method within the hermeneutic process does not translate into a rejection of method in all our practices. Indeed, philosophical hermeneutics can be supplemented with various methods to generate critical activities, or more precisely, certain methods can orient understanding and interpretation to be critical (or at least, that is my thesis). Such methods, then, can be understood to be critical *theories* insofar as they can guide one seeking to engage in critical activity. In particular, I focus on Habermas's communicative theory and Derrida's deconstruction as possible means for supplementing philosophical hermeneutics. Habermas, Derrida, and Gadamer share a crucial purpose: each in his own way attempts to identify and explain the conditions for human understanding, given the repudiation of subject-object metaphysics. Because this common purpose lies at the root of all their philosophies, the possible intertwining and grafting of their various approaches is likely to be fruitful.

A. *Habermas and Gadamer*

Habermas criticizes Gadamer's philosophical hermeneutics as being relativistic and politically conservative.⁴² From Habermas's perspective, Gadamer's hermeneutics fails to provide an adequate criterion for evaluating competing interpretations of a text.⁴³ Ultimately, the only basis for evaluating different interpretations is the authority of tradition, and thus, philosophical hermeneutics becomes exceedingly conservative.⁴⁴ Some other commentators concur with this assessment of Gadamer. John Caputo, for instance,

42. For a summary of the dispute between Habermas and Gadamer, see WARNKE, *supra* note 18, at 107-38.

43. *See id.*

44. *See id.*

calls Gadamer's philosophy "a reactionary gesture"⁴⁵ and a "foundationalism in disguise."⁴⁶

Even so, Habermas's discourse theory shares much with Gadamer's hermeneutics. Habermas deems his theory to be postmetaphysical, meaning that, like Gadamer, he rejects subject-object metaphysics.⁴⁷ Habermas contends that "[r]eaching understanding is the inherent telos of human speech,"⁴⁸ which resonates partly with Gadamer's assertion that human being-in-the-world is interpretive. Like Gadamer, then, Habermas seeks in part to identify the conditions for human understanding. He agrees with Gadamer that "knowledge is rooted in actual tradition; it remains bound to contingent conditions."⁴⁹ Moreover, Habermas concurs that understanding is sowed in consensus.⁵⁰

Habermas maintains, however, that Gadamer fails to recognize that consensus sometimes arises not because of the truth of an assertion but because of systematic distortions of the hermeneutic process.⁵¹ In order to identify such systematic distortions, Habermas insists that the hermeneutic process must be supplemented with a critical method.⁵² To arrive at this critical method, Habermas distinguishes between, on the one hand, the communicative interaction and symbolic reproduction of our "lifeworld" and, on the other hand, the strategic interaction and material reproduction of our economic and administrative systems.⁵³ Within the economic and administrative systems, strategically rational actions are sometimes appropriate.⁵⁴ For example, we might act strategically in the economic marketplace to try to maximize our profits without regard for the effects on other actors. Yet, while perhaps appropriate to the economic and administrative systems, such strategic rationality

45. JOHN D. CAPUTO, *RADICAL HERMENEUTICS: REPETITION, DECONSTRUCTION, AND THE HERMENEUTIC PROJECT* 5 (1987).

46. John D. Caputo, *Gadamer's Closet Essentialism: A Derridian Critique*, in *DIALOGUE AND DECONSTRUCTION: THE GADAMER-DERRIDA ENCOUNTER*, *supra* note 18, at 258, 259.

47. Habermas asserts that "no plausible alternatives exist" to "postmetaphysical thinking." HABERMAS, *BETWEEN FACTS AND NORMS*, *supra* note 19, at 443.

48. 1 HABERMAS, *THE THEORY*, *supra* note 19, at 287.

49. Habermas, *Review*, *supra* note 19, at 358.

50. "Rationally motivated decisions can be arrived at only on the basis of a consensus that is brought about by convincing speech." Habermas, *Universality*, *supra* note 19, at 184.

51. *See id.*

52. *See id.* at 184-85.

53. *See* 1 HABERMAS, *THE THEORY*, *supra* note 19, at 340-43; 2 HABERMAS, *THE THEORY*, *supra* note 19, at 150-52.

54. *See* 1 HABERMAS, *THE THEORY*, *supra* note 19, at 340-42.

inevitably interferes with communicative action or discourse.⁵⁵ Communicative interaction in the lifeworld should be directed toward mutual understanding and governed by the force of the best argument, but when strategic rationality colonizes our lifeworld, then communication is skewed or distorted.⁵⁶ The best argument no longer necessarily wins.

To correct for this defect in communication, Habermas proposes a critical method that can purify discourse by removing the distortions that arise from strategic and material forces. The crux of Habermas's critical method is his conception of the counterfactual "ideal speech situation."⁵⁷ The ideal speech situation is a counterfactual intersubjective encounter that is cleansed of domination, coercion, and other distortions arising from material forces and strategic rationality.⁵⁸ A consensus that emerges from the ideal speech situation reflects the force of the best argument only and thus allows us to identify truth and normative legitimacy.⁵⁹ Consequently, the ideal speech situation "makes possible unforced *universal* agreement."⁶⁰ The possibility for validating truth and normative legitimacy in this manner is, according to Habermas, universally presupposed by the very act of communication.⁶¹ Moreover, Habermas maintains that unless we posit the ideal speech situation as a critical standpoint, we have no method or means for distinguishing between a legitimate communicative consensus that manifests truth and an illegitimate consensus that arose from distorted communicative processes.⁶² We need some meta-hermeneutic approach so that we can critique communication and consensus; we must have, in other words, "a reference system that goes beyond the framework of tradition as such; only then can tradition also be

55. See *id.* at 340-41.

56. See HABERMAS, *LEGITIMATION CRISIS*, *supra* note 19, at 107-08.

57. Habermas, *Universality*, *supra* note 19, at 206.

58. See *id.*

59. See *id.*

60. *Id.* (emphasis added).

61. See 1 HABERMAS, *THE THEORY*, *supra* note 19, at 137, 306-08. According to David Couzens Hoy:

For Habermas a rational unity emerges from a social plurality of forms of life insofar as any form of life must contain "universal structures" that are revealed in communicative action. These universal structures are not present by chance, or by haphazard evolutionary luck, but are transcendently necessary presuppositions, no matter how mired they are in contingent motives and compulsions.

Hoy, *supra* note 14, at 181.

62. See Habermas, *Review*, *supra* note 19, at 358.

criticized.”⁶³ Otherwise, we are likely to succumb to ideological forces, without being aware that we are doing so.

Gadamer’s response is predictable yet powerful. He rejects Habermas’s critical method by insisting that the hermeneutic situation is universal: we can never escape our interpretive being-in-the-world.⁶⁴ For that reason, according to Gadamer, there never can be a critical reference system that stands outside of tradition.⁶⁵ Critical activity, in short, must itself necessarily be an interpretive act rather than a meta-hermeneutic process or method. Thus, to Gadamer, Habermas’s effort to supplement the hermeneutic process with a critical method is misplaced.

Gadamer is both right and wrong. Gadamer is right in asserting that all understanding, including critical activity, is hermeneutic. Any text or text-analogue—anything that is understood—is necessarily understood hermeneutically, understood because of our participation in our communal traditions. Moreover, our very being-in-the-world is interpretive. Thus critique must proceed hermeneutically, from within our horizons.

All of this, though, does *not* mean that method cannot supplement the hermeneutic process. In particular, a method can orient or guide interpretive activities toward critique. For instance, to take issue not only with Gadamer but also with Stanley Fish, throwing a baseball is a physical or mechanical process that can be guided (though not controlled) by a method.⁶⁶ I can articulate a method or series of steps for throwing a baseball that can be invoked to teach small children how to throw. I might tell a child to grip the ball loosely, reach back, start to bring her arm forward with the elbow bent, and so forth. To formulate as well as to understand my words is certainly a hermeneutic activity; as such, it does not entail the application of method. Indeed, if throwing a baseball is meaningful to us in any way whatsoever—and why else would we do it—then the actual physical throwing is itself an interpretive activity. This hermeneutic quality of the physical action of throwing follows from Gadamer’s claim that our very being-in-the-world is interpretive.

63. *Id.*

64. Gadamer, *Universality*, *supra* note 18, at 128, 134.

65. *See id.* at 134-35.

66. *See* Stanley Fish, *Dennis Martinez and the Uses of Theory*, 96 YALE L.J. 1773 (1987) (arguing that theory is irrelevant to the practice of pitching a baseball as well as to all other practices).

Even so, to throw a baseball is a practice that might be guided, at least initially, by some method.

Significantly, even Gadamer acknowledges that some practices, particularly science, include methods that ought to be followed. "Whoever wants to learn a science has to learn to master its methodology."⁶⁷ Indeed, the role of method, whether in science or in learning to throw a baseball, can be explained in hermeneutic terms. When I teach a child the method for throwing, for instance, I am communicating the tradition of baseball throwing to the child with the hope that I will instill certain prejudices in her about how to throw. After all, we could throw baseballs differently from how we normally do so (we might, for instance, throw a baseball more as we throw a football). At the same time, once a child learns how to throw, the throwing motion is not merely a matter of articulating or recalling certain prejudices or techniques. Although Gadamer does not adequately explain this important point, prejudices often "are learned or absorbed in a deep sense; they become embodied in individuals."⁶⁸ To borrow from the sociologist Pierre Bourdieu, who emphasizes the embodiment of practices, we might say that prejudices sometimes are "state[s] of the body" rather than merely "state[s] of mind."⁶⁹ An experienced baseball player just knows how to throw a ball without thinking about or discussing it. This embodied knowledge, though, is still meaningful and therefore hermeneutic.

Critical legal activity can be understood as a practice similar to science or to throwing a baseball: it is a practice that might be informed or guided (but never controlled) by method (or in other words, by a critical theory). Gadamer must admit that either we question our traditions and prejudices, doubting their legitimacy, or we accept them uncritically. If we accept them uncritically, then Habermas is correct; philosophical hermeneutics becomes a type of Burkean conservatism.⁷⁰ But hermeneutics can be critical, and Habermas shows us one way (or method) to view it so. Habermas's critical method can guide us as we struggle to identify forces distorting our conversations with others, and hence he can help us

67. Gadamer, *Universality*, *supra* note 18, at 135. Gadamer also refers to "the impressive methodology of modern science." *Id.*

68. Feldman, *supra* note 38, at 181.

69. PIERRE BOURDIEU, *THE LOGIC OF PRACTICE* 68 (Richard Nice trans., Polity Press 1990) (1980).

70. Sometimes, especially when responding to Habermas, Gadamer does sound conservative. See Gadamer, *On the Scope*, *supra* note 18, at 33-34 (discussing the authority of tradition).

recognize where our traditions have arisen because of illegitimate force, duplicity, or other distortive elements. For example, if one person in a conversation acts strategically, for the purpose of maximizing his or her own personal benefits, then we should expect the conversation to be skewed. I do not agree with Habermas's assertions that he has identified universal validity claims within the ideal speech situation, that his critical method can lead to universal truths, or that critical activity must be meta-hermeneutic. In my opinion, both Habermas and Gadamer, in their zealotry to refute each other, occasionally overstate their respective cases. Regardless of these hyperbolic claims, Habermas's ideal speech situation can be used as a means for identifying distortive forces within our communities and conversations, but such critical activities always and already are interpretive.

B. *Derrida and Gadamer*

Derridean deconstruction presents an alternative method for generating critical legal activity. In fact, some commentators claim that deconstruction is no more than a method. From this perspective, deconstruction is politically neutral; it can be used by both progressives and conservatives with equal effectiveness. I disagree with this viewpoint.⁷¹ To be sure, deconstruction is a method (or methods), but it is more than that. Hence, while deconstruction is politically ambivalent enough that it can be invoked by progressives and conservatives alike, it is not politically neutral.⁷² Rather, deconstruction has political implications. In the words of the philosopher Richard J. Bernstein, Derridean deconstruction is primarily "ethical-political-judicial,"⁷³ and the political orientation of deconstruction is progressive.⁷⁴ Deconstruction relentlessly highlights the oppression of the Other.

As is true of Gadamer and Habermas, Gadamer and Derrida share much in common. They both, as already mentioned, reject modernist subject-object metaphysics. Gadamer has explained that

71. See Feldman, *supra* note 38, at 196-97 (discussing J.M. Balkin's claim that deconstruction is only a method).

72. See Stephen M. Feldman, *The Supreme Court in a Postmodern World: A Flying Elephant*, 84 MINN. L. REV. 673, 709-10 (2000) (discussing the political ambivalence of postmodern thought).

73. RICHARD J. BERNSTEIN, *An Allegory of Modernity/Postmodernity: Habermas and Derrida*, in *THE NEW CONSTELLATION* 199, 209 (1991).

74. See Feldman, *supra* note 38, at 192-201 (discussing the politics of deconstruction).

"Derrida, too, is endeavoring to supersede any metaphysical realm of meaning which governs words and their meanings."⁷⁵ Since both Gadamer and Derrida then proceed to identify the conditions for human understanding, their approaches overlap considerably. For instance, deconstruction "echoes the ontological message of philosophical hermeneutics—that we are always and already interpreting."⁷⁶ Likewise, just as Gadamer asserts that we are always embedded within our communal traditions, Derrida insists that our conceptual apparatus must arise "from the text of a heritage."⁷⁷ Gadamer and Derrida would agree, moreover, that "truth keeps happening";⁷⁸ no one textual meaning remains stable or fixed in all contexts.

Paradoxically, perhaps, with regard to the dispute between Gadamer and Habermas, Derrida agrees partly with one and partly with the other. Like Habermas, Derrida seeks to be more critical than Gadamer does. Derrida agrees with Habermas, in particular, that Gadamer is far too sanguine about the legitimacy of tradition. Yet, whereas Habermas aims to purify communicative action of all distortive forces, Derrida aims to demonstrate that communication and understanding can never be so purified. Thus Derrida, in effect, agrees with Gadamer's criticism of Habermas's claim that we can have a meta-hermeneutic method that transcends tradition.

The key to understanding Derrida's critical method lies at a point where Derrida diverges from both Gadamer and Habermas. Gadamer and Habermas emphasize that consensus or agreement plays a crucial role in the hermeneutic process. Gadamer stresses the consensus that arises between interpreter and text within the conversation or dialogue of the hermeneutic process. Habermas emphasizes the consensus that would emerge among communicative actors within the ideal speech situation. To Derrida, though, any apparent consensus among a group of individuals is scarred by the suppression of some Other.

Derrida explains that meaning is never firmly grounded but rather always emerges from a play of signifiers. There are no stable signifiers—no firm or objective foundations for interpretation—

75. Gadamer, *Deconstruction*, *supra* note 18, at 112.

76. Feldman, *supra* note 40, at 57.

77. DERRIDA, *Structure*, *supra* note 20, at 285.

78. WEINSHEIMER, *supra* note 18, at 9.

rather, "there are nothing but signs."⁷⁹ The play of signifiers leads Derrida to his notion of *différance*:

[T]he signified concept is never present in and of itself, in a sufficient presence that would refer only to itself. Essentially and lawfully, every concept is inscribed in a chain or in a system within which it refers to the other, to other concepts, by means of the systematic play of differences. Such a play, *différance*, is thus no longer simply a concept, but rather the possibility of conceptuality, of a conceptual process and system in general. For the same reason, *différance*, which is not a concept, is not simply a word, that is, what is generally represented as the calm, present, and self-referential unity of concept and phonic material.⁸⁰

To Derrida, every hermeneutic event, every grasp of meaning, necessarily relies on some marginalized Other. Thus, whereas Gadamer emphasizes how the hermeneutic process empowers us, how we are enabled to understand texts, text-analogues, and each other, Derrida instead stresses a disempowering component within the hermeneutic process. To be certain, "a hermeneutic act produces meaning and empowers certain individuals and societal groups," but Derrida wants us never to forget that the same hermeneutic act "simultaneously represses and destroys potential meaning and disempowers other individuals and groups."⁸¹ Putting this deconstructive point in Gadamerian terms, whenever we understand a text, our prejudices necessarily prevent us from recognizing some potential textual meanings. Furthermore, the traditions that imbued us with our prejudices arose not from a purified culture (akin to Habermas's ideal speech situation) but rather from a culture riddled with oppression, brutality, and duplicity. Any tradition, according to Derrida, subjugates and hides some Other—some minority (or minorities), some outgroup (or outgroups), or some other marginalized people.⁸²

The methods of deconstruction thus aim at uncovering the traces of the Other that normally remain hidden in the margins. Derrida, though, is not as programmatic as Habermas. While Habermas carefully articulates his critical method, Derrida and other deconstructionists more often demonstrate various critical methods through their deconstructive readings of different texts. In other

79. DERRIDA, GRAMMATOLOGY, *supra* note 20, at 50.

80. JACQUES DERRIDA, MARGINS OF PHILOSOPHY 11 (Alan Bass trans., Univ. Chicago Press 1982) (1972).

81. Feldman, *supra* note 40, at 61.

82. *See id.* at 58.

words, there is no one deconstructive method; rather there are deconstructive methods.⁸³ One deconstructive approach is to focus on the production of tradition that undergirds a commonly accepted reading of a text. Tradition usually works best when it remains in the background. A plain meaning, for instance, seems to jump off a page only if we uncritically accept certain assumptions or prejudices that seem to ground the supposedly plain meaning.⁸⁴ Such assumptions necessarily arise from a tradition that lurks in the background of the hermeneutic process. A deconstructionist might struggle to bring the background to the foreground. Such a deconstruction would, in other words, thematize the tradition and its corresponding assumptions and prejudices. Questions such as the following would appear. Exactly what cultural assumptions or prejudices undergird the supposedly plain meaning of the text? What alternative meanings might emerge from the text if we had different cultural prejudices? Whose voice or claim—what cultural Other—has been denied or oppressed in our ordinarily enthusiastic acceptance of the plain textual meaning?⁸⁵

This type of deconstructive inquiry into background traditions and prejudices can take the form of a critical history in the Foucauldian vein.⁸⁶ Often times, our current assumptions seem

83. For an excellent illustration of a deconstructive approach in a jurisprudential context, see J.M. Balkin, *Tradition, Betrayal, and the Politics of Deconstruction*, 11 CARDOZO L. REV. 1613 (1990) (deconstructing a Supreme Court case).

84. "A meaning that seems to leap off the page, propelled by its own self-sufficiency, is a meaning that flows from interpretive assumptions so deeply embedded that they have become invisible." STANLEY FISH, *Still Wrong After All These Years*, in *DOING WHAT COMES NATURALLY* 356, 358 (1989).

85. Elsewhere, I have suggested an alternative deconstructive approach:

[P]ostmodern themes emerge in this Article as I (with the reader) perform a series of postmodern flips. A postmodern flip is a gestalt switch or paradigm move that reverses our prior approach to a text (or an event or a concept) and, in so doing, reveals previously unrecognized features of that text. Whereas modernists constantly attempt to reduce the meanings of texts to an essential core or single truth, postmodernists are anti-foundationalists and anti-essentialists. According to postmodernists, the meaning of a text is never grounded or stable, and therefore one can always find multiple meanings or truths. Thus, one performs a postmodern flip by taking a segment of a text, event, or concept that apparently has been reduced to a static meaning or truth and suggesting the possible existence of another (often radically different) meaning or truth. This alternative meaning or truth often emerges after one uncovers and disturbs the usually tacit assumptions underlying the original meaning. The postmodern flip then is completed by exploring how this new meaning or truth of the segment of the text, event, or concept might reorient one's understanding of the whole.

Stephen M. Feldman, *Diagnosing Power: Postmodernism in Legal Scholarship and Judicial Practice (with an Emphasis on the Teague Rule Against New Rules in Habeas Corpus Cases)*, 88 NW. U. L. REV. 1046, 1048 (1994).

86. See, e.g., MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* (Alan Sheridan trans., Pantheon Books 1977) (1975) (exploring the history of prisons).

neutral or natural. They do not appear to be cultural at all. A historical inquiry into the origins and development of such current assumptions, however, can reveal that they emerged from a distinctive cultural viewpoint—a cultural viewpoint that obscured and oppressed alternative cultural viewpoints. For example, I have elsewhere argued that the idea of the separation of church and state emerged from a Protestant-Christian culture and, as such, has predominantly (though not solely) reflected the interests of the Protestant majority in American society.⁸⁷

Regardless of the specific deconstructive method that is used, all deconstructions seek to disturb the dominant or privileged viewpoint. Any textual meaning, no matter how common, no matter how clear, is due partly to violence. Any consensus, any community in apparent harmony, conceals some marginalized Other. In the words of Derrida, “[t]he privilege granted to unity, to totality, to organic ensembles, to community as a homogenized whole—this is a danger . . . for ethics, for politics.”⁸⁸ In fact, from this viewpoint, a Habermasian critique itself can be understood as a type of deconstruction insofar as it attempts to identify the forces that distort communication. But a crucial difference between Habermas and Derrida, themselves, is that Habermas believes communication can be purified of distortive forces so that we can achieve universal truths, while Derrida insists there always exists some oppressed Other. To Derrida, every text, “even a postmodern deconstructive text, can be deconstructed.”⁸⁹

Finally, it is worth noting that Derridean deconstruction is, from one vantage, parasitic on philosophical hermeneutics. It is the understanding of meaning that engenders deconstruction. Without understanding, as explained by Gadamer’s philosophical hermeneutics, deconstruction could not begin in the first place. Moreover, the very concepts that a deconstructionist must use in order to deconstruct a text are necessarily understood through the hermeneutic process. Critique is not possible without understanding, and Gadamer’s hermeneutics explains how understanding occurs. (Although from a different vantage, we might emphasize that deconstruction reveals how every understanding also contains a

87. See generally STEPHEN M. FELDMAN, *PLEASE DON’T WISH ME A MERRY CHRISTMAS: A CRITICAL HISTORY OF THE SEPARATION OF CHURCH AND STATE* (1997).

88. DERRIDA, NUTSHELL, *supra* note 20, at 13.

89. Stephen M. Feldman, *Playing with the Pieces: Postmodernism in the Lawyer’s Toolbox*, 85 VA. L. REV. 151, 178 (1999).

misunderstanding—that hermeneutics, in other words, is parasitic on deconstruction).

CONCLUSION

Many opponents of critical legal thinkers assert that it is easy to be critical but hard to be constructive. From this perspective, critical legal activity is simple, while traditional theory is difficult. I disagree. Gadamer's emphasis on the role and power of tradition in the hermeneutic process suggests how tradition forcefully constrains us. Our prejudices, derived from our communal traditions, limit what we can understand and perceive. Thus, to perform critical activity proves often to be a formidable challenge. It requires the writer somehow to disrupt the reader's basic and deep-seated assumptions—assumptions that typically emerge from a dominant culture and that have been inculcated and reinforced for much (or all) of the reader's life. This type of critical work, to be effective, often requires more imagination and originality than a straightforward prescription for change, which one would see in traditional theory.

Despite the difficulty of engaging in critical work, Gadamer's persuasive explanation of the hermeneutic process also elucidates how critical activity is possible in the first place. We can understand critical concepts or tools only because we participate in our communal traditions. Our prejudices, from our traditions, open us to the possibility of comprehending meaning. If not for our interpretive being-in-the-world, we could not even begin to think critically (or in any other manner!).

Gadamer's philosophical hermeneutics thus explains how critical legal activity is possible yet difficult. Significantly, then, Gadamer does not attempt to develop any method to guide critical activity. Gadamer should not necessarily be faulted for this lacuna. His primary purpose is to explain how we come to understand a text, and he accomplishes this task admirably. But, as I have argued, various methods can orient interpretation and understanding toward critique. In particular, Habermas's discourse theory and Derrida's deconstruction can be invoked to guide critical legal activity. Other critical methods are also possible; no one or two methods can possibly guide all critical activities.⁹⁰ For example, a critical perspective can be

90. See generally PAUL FEYERABEND, *AGAINST METHOD* (3d ed. 1993) (arguing that science has not progressed through the application of some single monolithic scientific method).

generated by combining a cultural with a sociological analysis. In particular, a critical thinker can attempt to focus on discrepancies between cultural messages and social structures.⁹¹ If a dominant cultural message is that everyone has equal liberty, but the society is actually structured otherwise—say, there are gross disparities of wealth—then we might conclude that the cultural message or symbol is ideological. The cultural message, that is, tends to obscure rather than accurately depict the true social relationships.⁹²

Ultimately, regardless of the specific contours of a critical method, any such method would tend to encourage us to self-consciously spotlight aspects of the horizon beyond the narrow point that is normally illuminated. A critical method brings the background to the foreground so that we can examine some of our tacit cultural assumptions. Such critical activity certainly cannot liberate us from our interpretive being-in-the-world or from the social reality of living within certain communal traditions. But critical activity, if successful, can at least change how (or what) we see or understand and might eventually transform our world.

91. This critical approach resonates with Habermas's critical method insofar as he distinguishes between the symbolic reproduction of our lifeworld and the strategic interaction and material reproduction of our economic and administrative systems. See 1 HABERMAS, *THE THEORY*, *supra* note 19, at 340-43; 2 HABERMAS, *THE THEORY*, *supra* note 19, at 150-52.

92. I elaborate and apply this type of critical method in my book on the separation of church and state. I argue that, on the one hand, the constitutional principle of separation of church and state supposedly protects the religious liberty of all Americans equally. But the social reality is otherwise. Members of minority and outgroup religions generally do not receive the same level of protection as members of the more mainstream Christian religions. See FELDMAN, *supra* note 87, at 255-82.